

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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GABRIELA RESENDEZ,

Case No. 2:15-cv-00061-JAD-PAL

Plaintiff,

ORDER

v.

(Mot to Compel and Sanctions – Dkt. #1)

SMITH'S FOOD & DRUG CENTERS, INC.,
et al.,

Defendants.

The court held a hearing on Plaintiff's Motion to Compel and for Sanctions (Dkt. #1-3, p. 40 of 154) on March 3, 2015. Daniel Simon appeared on behalf of the Plaintiff, and Jerry Busby appeared on behalf of the Defendants. The court has considered the motion, Defendants' Response (Dkt. #7), Plaintiff's Reply (Dkt. ##11) and the arguments of counsel at the hearing.

BACKGROUND

I. Procedural History.

This case has a long and tortured procedural history. It arises out of a slip-and-fall at a Smith's grocery store on July 14, 2012. The complaint was initially filed in state court on January 13, 2014, and removed by the Defendants on February 7, 2014, and assigned Case No. 2:14-cv-00201-APG-NJK. Plaintiff filed a motion to remand February 18, 2014, to preserve her right to seek remand once she determined the identity of a Doe employee. After the parties exchanged discovery, Plaintiff filed a motion to amend her complaint to name Ryan Overbey as a Defendant in place of a Defendant Doe employee, and supplemented her motion to remand. Judge Gordon granted Plaintiff's motion to amend, and remanded the case to state court on April 7, 2014. Plaintiff filed her amended complaint naming Mr. Overbey as a Defendant April 8, 2014.

1 On May 7, 2014, Smith's filed a motion to reconsider requesting that Judge Gordon
2 reconsider his order granting leave to amend and remanding the case. The matter was remanded
3 to state court where the parties remained until January 13, 2015, when Smith's filed a second
4 notice of removal which resulted in assigning the case a new case number and randomly
5 assigning two new judges. Judge Dorsey and I were assigned to this case. I notified the
6 chambers of both district judges of the unusual procedural posture of this case and that it has
7 been removed for the second time and assigned a new case number and new judges. In an order
8 entered March 2, 2015, Judge Gordon denied Defendants' motion for reconsideration of his prior
9 order granting leave to amend the complaint to add Mr. Overbey as a Defendant and remanding
10 the case to state court. Plaintiff's Motion to Remand (Dkt. #19) was filed under this case number
11 February 12, 2015. The briefing period on the motion to remand filed under this case number
12 has not yet run.

13 The two motions for sanctions set for hearing March 3, 2015 were filed in state court
14 prior to Defendants' second notice of removal. The responses and replies were filed after the
15 notice of removal. Neither side applied for a stay of discovery or other proceedings while the
16 motion to remand was decided on the merits, and both motions were listed on the motions which
17 this court needed to address in the parties joint status report concerning removal. (Dkt. #20)
18 Accordingly, the court set these two motions for hearing to resolve the parties' disputes to allow
19 the parties to complete discovery to get this case to ultimate resolution either here or in state
20 court.

21 **II. Plaintiff's Motion to Compel and for Sanctions (Dkt. #1-3, p. 40 of 154).**

22 Plaintiff's motion to compel and for sanctions seek sanctions for Smith's failure to appear
23 for a Rule 30(b)(6) deposition initially served October 8, 2014, to take place on December 3,
24 2014. The motion relates the series of events that resulted in Defendants' failure to produce a
25 Rule 30(b)(6) deponent and produce documents responsive to the subpoena duces tecum served
26 with the notice. The parties eventually agreed to continue the 30(b)(6) deposition to December
27 17, 2014, amended deposition notices and related requests for production of documents were
28 served, and the deposition went forward on December 17, 2014. However, Defendants did not

1 produce documents Plaintiff requested, objected to certain lines of questions, and instructed the
2 witness not to answer. Plaintiff therefore seeks an order compelling Defendants to produce
3 additional documents requested in the Rule 30(b)(6) deposition notice.

4 Plaintiff also seeks an order compelling Defendants to respond to Request for Production
5 of Document Nos. 7, 10, 13, 18, 19 – 24, and 26. Finally, Plaintiff asks for an award of
6 attorney's fees for the necessity of preparing for and taking a second deposition after the
7 documents Plaintiff was seeking are finally produced.

8 Defendants oppose the motion arguing that it cannot produce what it does not
9 have. Specifically, Smith's claims it does not have a schematic drawing of the store showing
10 surveillance camera locations, policies and procedures concerning review of surveillance footage
11 and preservation, master surveillance camera footage, or a schedule of Mr. Overbey's duties on
12 the date of the incident. Smith's refused to produce records of prior incidents because it
13 contends the request is overbroad and Plaintiff is hoping to go on a "proverbial fishing
14 expedition" through Smith's files. Smith's has not produced employee cards for employees
15 working around the time of the fall or personnel files for these employees because the request is
16 overbroad and will not lead to the discovery of admissible evidence. Smith's contends that it has
17 produced relevant portions of its policies and procedures to the Plaintiff and should not be
18 compelled to produce anything further. Finally, Smith's argues that even if the court was to
19 compel Smith's to produce additional information, Plaintiff is not entitled to sanctions in the
20 form of attorney's fees and costs because its resistance to the discovery in dispute was
21 substantially justified.

22 DISCUSSION

23 Smith's asserted boilerplate objections to each of the requests in dispute. Federal courts
24 have routinely held that boilerplate objections are improper. *St. Paul Reinsurance Company,*
25 *Ltd. v. Commercial Financial Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (collecting cases
26 and sanctioning a lawyer for using boilerplate objections in response to requests for production
27 of documents). "Boilerplate, generalized objections are inadequate and tantamount to not
28 making any objection at all." *Walker v. Lakewood Condo Owner's Ass'n*, 186 F.R.D. 584, 587

1 (C.D. Cal. 1999) (citations omitted). The Ninth Circuit has held “that boilerplate objections or
2 blanket refusals inserted into a response to a Rule 34 request for production of document are
3 insufficient to assert a privilege.” *Burlington N. & Santa Fe Ry. Co. v. U.S. District Court for*
4 *the Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

5 Having reviewed and considered the voluminous moving and responsive papers and the
6 arguments of counsel at the hearing, the motion is granted in part and denied in part.
7 Defendants’ boilerplate objections are overruled and stricken. Defendants have not met their
8 burden of establishing that the discovery requests are burdensome or oppressive. For example,
9 Request No. 7 asks for a copy of accident and incident reports for the two-year period prior to
10 Plaintiff’s fall in the subject store. During oral argument, counsel for Smith’s acknowledged he
11 has represented the company for more than two decades and, in response to a question from the
12 court, conceded that there were probably only ten or twelve slip and falls a year in a store like the
13 one involved in this case.

14 The court is also not satisfied that Smith’s has complied with its obligation under Rule
15 26(g) to make a diligent search for responsive documents. Rule 26(g) imposes obligations on
16 attorneys and clients signing disclosures and discovery requests, responses and objections. Rule
17 26(g)(1) requires every discovery request, response, or objection to be signed by at least one
18 attorney of record, or by the party personally. The rule provides that by signing a discovery
19 request, response, or objection, “an attorney or party certifies to the best of the person’s
20 knowledge, information, and belief **formed after a reasonable inquiry**” the response is
21 complete and correct as of the time made, and with respect to a response or objection, it is
22 consistent with the rules, not interposed for any improper purpose, and neither unreasonable nor
23 unduly burdensome or expensive. (Emphasis supplied). The court will therefore require Smith’s
24 to comply with the reasonable inquiry standard described by the court in *National Ass’n of*
25 *Radiation Survivors v. Turnage*, 115 F.R.D. 543, 554-56 (N.D. Cal. 1987). Specifically, Smith’s
26 will be required, at a minimum, to distribute the discovery requests in dispute to its employees
27 and agents potentially possessing responsive information, and to account for the collection and
28 subsequent production of the information to the Plaintiff. To assure that Smith’s actually makes

1 a “reasonable inquiry,” the court will also order it to provide Plaintiff with declarations or
2 affidavits detailing the nature of its “reasonable inquiry” to locate responsive documents.

3 As an example, Smith’s written opposition papers, and letter exchanges before the motion
4 was filed state Smith’s does not have a schematic drawing of the locations of its surveillance
5 cameras in the store. However, Smith’s Rule 30(b)(6) designee, Ms. Iverson, testified at her
6 deposition that the security department would have a blueprint of the location of the surveillance
7 cameras. Ms. Iverson was deposed December 17, 2014. Smith’s opposition to this motion was
8 filed a month later on January 16, 2015, and Smith’s persists in arguing to the court that it cannot
9 produce a schematic drawing of the store showing surveillance camera locations “because no
10 such evidence exists.” Smith’s clearly failed to make reasonable inquiry in responding to
11 Plaintiff’s discovery requests.

12 **IT IS ORDERED** that:

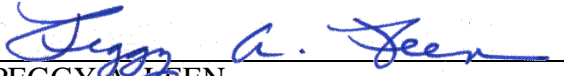
- 13 1. Smith’s shall have until **March 24, 2015**, in which to provide full and
14 complete responses to Request for Production of Documents Nos. 7, 10, 18,
15 19, 20, 22, 23, 24 and 26.
- 16 2. If, after a reasonable inquiry, Smith’s has no responsive documents, Smith’s
17 must supplement its discovery responses to plainly so state.
- 18 3. The motion is **DENIED** with respect to Request for Production No. 13 which
19 is overbroad on its face in requesting the entire personnel files of ten
20 individuals.
- 21 4. Smith’s shall have until **March 24, 2015**, to supplement its discovery
22 responses, without objections. The court would be within its discretion to find
23 that Smith’s boilerplate objections have waived privilege. However, the court
24 will permit Smith’s to withhold genuinely privileged documents and require it
25 to serve a privileged document log which fully complies with the
26 requirements of Rule 26(b)(5) for any document withheld on the basis of
27 privilege
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1 5. Smith's shall have until **March 24, 2015** to provide Plaintiff with declarations
2 or affidavits detailing the nature of Smith's "reasonable inquiry" to locate
3 responsive documents.

4 6. The motion is **GRANTED** to the extent the Plaintiff will be awarded
5 reasonable costs and attorney's fees for the necessity of deposing Smith's
6 30(b)(6) designee a second time on the additional documents Smith's
7 unreasonably withheld from discovery after making boilerplate objections.

8 7. Any request for relief not specifically addressed in this order is denied.

9 DATED this 16th day of March, 2015.

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11 
12 PEGGY A. LEEN
13 UNITED STATES MAGISTRATE JUDGE
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